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NO. 85-556

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

vs.

HENRY ARTHUR DRAKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mary J. Wilkes
COUNSEL OF RECORD
FOR RESPONDENT

MARTIN & YOUNG, P.C.
44 Broad Street, N.W.
Suite 504, Grant Building
Atlanta, Georgia 30303
(404) 522-0400

Robert L. McGlasson
57 Forsyth Street, N.W.
Suite 600, Healey Bldg.
Atlanta, Georgia 30303
(404) 688-1202

## QUESTION PRESENTED FOR REVIEW

Whether Certiorari is warranted where the Court of Appeals for the Eleventh Circuit conscientiously followed and correctly applied the holdings of this Court to each of the issues on which it granted relief to Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Henry Arthur Drake, respectfully prays that the State's Petition for Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit be denied.

## STATEMENT OF THE CASE

The Respondent is in agreement with the State's presentation of the legal history of this case. However, Respondent strongly contests the State's alleged "review of the evidence presented at Respondent's trial." What is contained in the State's statement of the case is not a review of the evidence presented at trial, but rather a totally one-sided and misleading representation of the evidence which recites only that evidence which is favorable to the State's position and which

totally ignores the evidence supporting the Respondent's position and the Eleventh Circuit decision. Thus, a more thorough review of the facts is necessary to this proceeding.

The State's recitation of the facts in this case gives the impression that, based on the evidence, there was no doubt that Mr. Drake committed the murder and armed robbery for which he is presently confined on Georgia's death row. However, as the Eleventh Circuit Court of Appeals was careful to point out, the record actually reflects "considerable controversy over who was the perpetrator of the crimes". Drake v. Kemp, 672 F.2d 1449, 1455, State's Appendix, p. 52. Indeed, in his concurring opinion in Drake v. Kemp, Judge Clark sets out in detail the extensive record below which indicates that Mr. Drake, true to his word at trial, was not guilty of the armed robbery and murder of which he presently stands convicted. Id., at 1470-1476; State's Appendix, pp. 90-105. In the interest of brevity and in order to avoid undue duplication, Respondent respectfully incorporates by reference, as a part of his statement of the case, the summary of the evidence as presented by Judge Clark in the above-cited portions of Drake v. Kemp and urges the Court to review this summary, as well as the brief summary made in the majority opinion at p. 1454 (State's Appendix, pp. 50-51), to obtain a much more thorough and accurate portrayal of the evidence.

A very brief synopsis of the evidence ignored by the State established that Mr. Drake and his girlfriend dropped William Campbell, Drake's co-defendant, off at the barbershop where the crime occurred on the evening the crimes were committed. Drake, his girlfriend and several family members testified that Drake and the girlfriend then drove to Drake's parents house nearby, where they were having dinner and were visiting during the time it was established that the crimes took place. Later, Drake and his girlfriend returned and picked Campbell up across the street from the barbershop and drove back to their own

house in another community. Thus, while Drake clearly transported Campbell to and from the scene of the crimes, his intent in doing so was critically in dispute. See, Drake v. Kemp, 762 F.2d 1449, 1454; State's Appendix, pp. 50-51.

The trial court charged the jury on three theories of murder - malice murder, felony murder and aiding and abetting - and instructed the jury that under either theory they could find Mr. Drake guilty of the murder and armed robbery. After over six hours of deliberation, the jury returned a general verdict of guilty.

Several years after the trial, Campbell recanted entirely the testimony he had given against Drake. Campbell's testimony had been the only evidence at Drake's trial implicating him in the crimes.

The issue of Mr. Drake's innocence has been properly raised at every stage of his appeals. However, the en banc Eleventh Circuit Court declined to rule on this issue due to its reversal of the convictions based on the Sandstrom issue in the case.

## SUMMARY OF THE ARGUMENT

For the following reasons, review of this case on certiorari is neither warranted under the usual considerations governing review on certiorari as outlined in Rule 17 of this Court nor is such review a desirable exercise of the Court's discretion:

I. The Sandstrom Violation

The Eleventh Circuit held that the charge given on intent in this case was virtually identical and constitutionally indistinguishable from the charge found by this Court to be impermissibly burden-shifting in Francis v. Franklin, ___U.S.__ , 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In reaching its decision, the Eleventh Circuit considered the trial court's instructions as a whole, as required by Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), to determine whether the erroneous charge was cured by any additional instructions from the Court.

After a careful review of the entire jury charge, and specifically employing the analysis set forth by this Court in Francis v. Franklin, supra, the Eleventh Circuit concluded that the additional language was not curative and that the challenged instruction violated Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 61 L.Ed.2d 39 (1979)

In that the Eleventh Circuit meticulously and faithfully adhered to the applicable law of this Court in reaching its ruling on this issue, certiorari is neither warranted nor desirable.

II. The Harmless Error Question

Having determined that there was a Sandstrom violation, the Eleventh Circuit went on to hold that, under the facts of this case, the Sandstrom error was not harmless.

In making its harmless error determination, the Court properly applied the standards prescribed by both the plurality and dissenting opinions of this Court in Connecticut v. Johnson, 460 U.S. 83 (1983), and held that, under either standard, the Sandstrom error was clearly harmful in this case. The Court's harmless error analysis involved two questions: (1) whether the evidence of intent was overwhelming, and (2) whether the instruction concerned an element of the crime which was not put in issue at trial.

The Court first opined that had Respondent been tried only on the theory of malice murder, the Sandstrom error might well have been harmless because the evidence at trial as to the intent of the actual perpetrator to kill was overwhelming. Moreover, since Respondent presented an alibi defense to the actual killing, the instruction would not have affected the issue of the perpetrator's intent to kill.

However, the Court pointed out that Respondent was also tried for murder under an aiding and abetting theory, and that Respondent's potential liability as an aider and abetter was squarely before the jury and was the likely theory on which he

was convicted, given the jury's general verdict of guilty and the markedly non-overwhelming nature of the evidence implicating Respondent as the actual killer.

As to the Respondent's culpability for the murder under an aiding and abetting theory (i.e. the getaway man), the Court correctly noted that if the jury found Respondent guilty only on a theory of accomplice liability, then "the State's burden in the Sandstrom context would be to prove both that the actual killer, presumably [the co-defendant], intended to kill and that [Respondent] intended to aid and abet the crimes." (Emphasis in original). (Drake v. Kemp, 762 F.2d 1449, 1456 (1985); State's Appendix, p. 54).

The Court found that the erroneous intent instruction could have affected the jury's determination of whether Respondent intended to aid and abet the crimes and that that issue of intent was clearly before the jury.

Finding that the evidence of intent on this issue, which came solely from the co-defendant, was far from overwhelming, the Court concluded that the Sandstrom error was not harmless error in this case, under the standard set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 17 L.Ed.2d 705 (1967) (A criminal conviction must be reversed if the appellate court cannot say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S.Ct. at 828).

The Eleventh Circuit having once again meticulously and carefully adhered to the prior decisions of this Court on this issue, review on certiorari is unwarranted and would be improvident.

III. The Improper Prosecutorial Argument

The Eleventh Circuit properly held that the argument of the prosecutor to the jury in the penalty phase of Mr. Drake's trial, in which he expressed the view that mercy was not an appropriate consideration in the exercise of the jury's

sentencing discretion and attributed that view to the State's highest Court, was improper in that it was misleading, affirmatively misrepresented the law and was prejudicial.

The Court correctly applied this Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and held that, under the particular facts of this case (including the weakness of the evidence as to Mr. Drake's guilt), the extremely improper use of the century-old Georgia Supreme Court cases undermined confidence in the outcome of Respondent's sentencing proceeding and rendered that proceeding fundamentally unfair.

In that the Eleventh Circuit specifically based its decision of this issue on prior decisions of this Court, review on certiorari is, once again, both unwarranted and undesirable.

IV. Conclusion

It is clear from the foregoing that, with regard to each issue upon which the State seeks certiorari, the legal analysis employed by the Eleventh Circuit was absolutely correct and was in total accord with the prior holdings of this Court. Thus, all the State is really asking this Court to review are the results and findings unanimously reached by the Court of Appeals, which findings were based on the Court's careful review and analysis of the particular facts of this case. Respondent Drake respectfully submits that the State's disagreement with the factual findings and holdings of the Court of Appeals is simply not an appropriate or prudent reason for this Court to review this case on certiorari.

## ARGUMENT
## (REASONS FOR DENYING THE WRIT)

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THIS COURT'S ANALYSIS IN FRANCIS V. FRANKLIN, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), TO THE IMPROPER INTENT CHARGE IN THIS CASE AND DETERMINED THAT THERE ARE NO CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN THAT CHARGE AND THE CHARGE FOUND TO BE CONSTITUTIONALLY IMPERMISSIBLE IN FRANCIS V. FRANKLIN. THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI, AS THE STATE REQUESTS, TO "DETERMINE THE PARAMETERS OF FRANCIS V. FRANKLIN.

The State implores this Court to grant certiorari in order to narrow the application given to Francis v. Franklin by the Eleventh Circuit. It argues that the Eleventh Circuit looked only at isolated language in the jury charge and did not review the trial court's instructions as a whole, as required by Cupp v. Naughten, 414 U.S. 141, 146 (1973).

There is simply no basis for the State's request. The Eleventh Circuit specifically took note of the argument that the charge, as a whole, cured any particular potentially burden-shifting instructions. The Court unanimously held that when read as a whole a reasonable jury could still have interpreted the instructions as placing on the Mr. Drake the burden of proof on intent. The Court held:

> After a careful review of the entire jury charge, and employing the analysis set forth by the Supreme Court in Francis v. Franklin, we find that a reasonable juror could well have concluded that Drake bore the burden of proof on the necessary element of intent. The relevant portions of the jury instructions cannot be distinguished from the jury charge in Francis v. Franklin, which we find to be controlling. We thus conclude that the instructions violated Sandstrom. (Emphasis added).[1]

Drake v. Kemp at 1453; State's Appendix, p. 48.

Thus, it is clear that, contrary to the State's contentions, the Eleventh Circuit fully considered the burden-shifting charge on intent in the context of all other allegedly

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[1]Indeed, the supposedly "curative" language cited by the State (Petition for Writ of Certiorari, p. 15), though not verbatim the same as the ameliorative language considered in Francis v. Franklin, is, as the Eleventh Circuit found, "substantially identical." Drake v. Kemp at 1453; State's Appendix, p. 48. See, Francis v. Franklin, 85 L.Ed.2d 344 at 351-352 and 356-357.

curative instructions, as required by Cupp v. Naughten. Therefore, certiorari review is not warranted.

II. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HARMLESS ERROR RULE OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), TO THE FACTS OF THIS CASE AND FOUND THE SANDSTROM ERROR NOT TO BE HARMLESS. THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI ON THIS ISSUE.

Having determined that the charge given by the Court on intent violated Sandstrom, the Eleventh Circuit, after carefully analyzing the evidence at trial and the trial court's charge as a whole, concluded that the Sandstrom error was not harmless in this case.

The State seeks certiorari on this issue, erroneously asserting that intent was not an issue in the case and, thus, that the Sandstrom error was harmless. The State argues that because Respondent presented an alibi defense to the actual killing the question of intent was totally removed from the jury's consideration and, thus, that the Sandstrom error should have been found to be harmless under the rationale of the plurality decision in Connecticut v. Johnson, 460 U.S. 83 (1983). The State urges the Court to grant certiorari "to review the applicability of the harmless error rule to alleged Sandstrom violations, in situations in which a criminal defendant removes intent as an issue for the jury to determine, by means of the defense which is asserted by that defendant", thereby implying that the Eleventh Circuit ignored the exception noted in the plurality opinion of Connecticut v. Johnson. Petition for Writ of Certiorari, pp. 18-20.

In fact, the Eleventh Circuit decided the harmless error question by applying the standards outlined in both the plurality and the dissenting opinions in Connecticut v. Johnson. Specifically, the Court followed its previous decision in Davis v. Kemp, 752 F.2d 1515, 1520-21 (11th Cir. 1985), and considered the following two questions in making its harmless error analysis: (1) Was the evidence of intent overwhelming? and (2) Did the instruction concern an element of the crime which was

not put in issue at trial? These are precisely the issues for determining harmless error outlined by this Court in its various opinions in Connecticut v. Johnson.

The Eleventh Circuit correctly determined that while Mr. Drake did deny participating directly in the armed robbery and murder, and did present alibi witnesses in support of his denial of participation in the actual killing (the malice murder), he admitted certain acts (e.g., driving the co-defendant to and from the scene) which, when combined with proper proof of intent, could have supported a guilty verdict based on aiding and abetting the crimes.

With this evidentiary background, the Eleventh Circuit first noted that, under the facts, there was overwhelming evidence that the actual perpetrator of the murder intended to kill the victim. Having made that determination, the Court opined that:

> If malice murder were the only theory asserted by the State, or the only theory submitted to the jury, we would conclude that the erroneous intent instruction was harmless on these facts. Under the malice murder theory, the only issue for the jury would have been whether Drake was present in the barber shop, as Campbell testified, or elsewhere, as Drake testified, and the questioned instruction could have had no bearing on this issue.[2]

Drake v. Kemp at 1455; State's Appendix, pp. 52-53.

However, as the Court correctly noted, "malice murder was not the only theory submitted to the jury. A prominent part of the prosecutor's case was the theory of accomplice liability." Drake v. Kemp at 1455; State's Appendix, p. 53. Under the evidence presented at trial (including Drake's own testimony), as well as the arguments of counsel and the trial court's charge, "the choice to convict Drake of armed robbery and murder solely on the basis of Drake's aiding and abetting the

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[2]Thus, the Court held, consistently with both the plurality and dissenting opinions in Connecticut v. Johnson, that the issue of intent was not before the jury and therefore the Sandstrom violation was harmless as to this theory, but only this theory, of the crime.

crimes committed by Campbell was squarely before the jury." Drake v. Kemp at 1456; State's Appendix, p. 56.

Under Georgia law, a conviction for murder on an aiding and abetting theory requires a finding of intent to aid and abet. Drake v. Kemp at 1455-1457; State's Appendix, pp. 52-57. The Eleventh Circuit, thus, correctly ruled that "[i]f the jury found Drake guilty on a theory of accomplice liability, then it is clear that the State's burden in the Sandstrom context would be to prove both that the actual killer, presumably Campbell, intended to kill, and that Drake intended to aid and abet the crimes." Drake v. Kemp at 1456; State's Appendix, p. 54.

Having found that "aiding and abetting must be intentional" and that "that intent element could have been affected by the erroneous burden-shifting instruction on intent" (emphasis added), the Eleventh Circuit correctly determined that the final issue before it with regard to whether the Sandstrom error was harmless was "whether there was overwhelming evidence that Drake intended to aid and abet the crimes." (Emphasis in original). The Court concluded that "[t]he only evidence on this issue came from Campbell, which falls far short of constituting overwhelming evidence." Drake v. Kemp at 1457; State's Appendix, p. 56.

Accordingly, having determined that, under the peculiar facts of the case, intent (at least with regard to aiding and abetting) was an issue in the case, whether or not the Respondent asserted an alibi defense to the actual killing, and that there was not overwhelming evidence th Drake intended to aid and abet the crimes, the Eleventh Circuit concluded that under the Chapman harmless error standard, the Sandstrom error was not harmless beyond a reasonable doubt.

As the plurality in Connecticut v. Johnson held, presenting an alibi defense "may in some cases" concede the question of intent. Id., 74 L.Ed.2d 823 at 834 (Emphasis added). However, contrary to the State's argument, asserting an alibi defense

does not in all cases concede the issue of intent. This case is, as the Eleventh Circuit properly held, a case in which, under its peculiar facts, intent remained a crucial issue to be determined by the jury.

In that the Eleventh Circuit carefully and painstakingly analyzed the harmless error question in accordance with the law of this Court, review of the Eleventh Circuit's decision on this issue is not warranted.

III. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HOLDINGS OF THIS COURT TO THE FACTS OF THE CASE AND PROPERLY FOUND THAT THE PROSECUTOR'S CLOSING ARGUMENT IN THE PENALTY PHASE RENDERED THE PROCEEDING FUNDAMENTALLY UNFAIR. THUS, REVIEW BY THE COURT OF THIS ISSUE IS NOT WARRANTED

Once again, the State would have this Court believe that the Eleventh Circuit ignored applicable Supreme Court law, specifically Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), in deciding that the prosecutor's closing argument in the penalty phase violated due process. Once again, nothing could be more untrue. Contrary to the State's contention, the Court of Appeals specifically employed and correctly applied the "fundamental fairness" test prescribed by this Court in Donnelly v. DeChristoforo in ruling in Respondent's favor on this question.

The Court first correctly determined that the argument was, without question, improper. Specifically, the Court concluded that the prosecutor's argument that mercy was an inappropriate consideration for the exercise of the jury's sentencing discretion and his attribution of that view to the State's highest court was "misleading, legally incorrect and prejudicial." Drake v. Kemp at 1460; State's Appendix, p. 65. Under Georgia's capital sentencing scheme, the jury is required by law to decide whether or not to be merciful, even if it finds beyond a reasonable doubt the presence of the required aggravating circumstances. Thus, even to imply to the jury that mercy is contrary to the law or is disapproved by the Supreme Court of Georgia "strikes at the core of the jury's role in

capital sentencing" and is "fundamentally opposed to current death penalty jurisprudence." Drake v. Kemp at 1460; State's Appendix, p. 66.

The Court then set out to determine "whether there was a reasonable probability that the improper argument changed the jury's exercise of discretion in choosing between life imprisonment and death." Drake v. Kemp at 1460; State's Appendix, p. 65. Noting the weakness of the case against Drake and the difficulty the jury had in finding him guilty, the Court concluded:

> "Under all the circumstances of this case, [the prosecutor's] extremely improper use of the century-old Georgia Supreme Court cases to suggest the impropriety of mercy 'undermine[s] confidence in the outcome' of his sentencing proceeding."

And, further:

> "...that the improper argument rendered Drake's sentencing proceeding fundamentally unfair."

Drake v. Kemp at 1461; State's Appendix, p. 67.

As with the other two issues presented by the State's Petition for Writ of Certiorari, the Eleventh Circuit conscientiously and correctly adhered to the law of this Court in reaching its decision and, thus, certiorari in this case is unnecessary, inappropriate and inadvisable.

IV. CONCLUSION

It is clear from the foregoing argument that, with regard to each issue upon which the State seeks certiorari, the legal analysis employed by the Eleventh Circuit was absolutely correct and was in total accord with the prior holdings of this Court. Thus, all the State is really asking this Court to review are the results and findings unanimously reached by the Court of Appeals, which findings were based on the Court's careful review and analysis of the particular facts of this case. Respondent Drake respectfully submits that the State's disagreement with the factual findings and holdings of the Court of Appeals is simply not an appropriate or prudent reason for this Court to review this case on certiorari.

For all the foregoing reasons, Respondent respectfully requests that the State's Petition for Writ of Certiorari be denied.

Respectfully submitted,

Mary J. Wilkes

Martin & Young, P.C.
44 Broad Street, N.W.
504 Grant Building
Atlanta, Georgia 30303
(404) 522-0400

CERTIFICATE OF SERVICE

This is to certify that I have this day served Susan V. Boleyn, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334 with a copy of the within and foregoing Brief in Opposition to Petition for Writ of Certiorari by depositing same in the U.S. Mail in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 30th day of October, 1985.

Mary J. Wilkes